CHEONG FATT TZE MANSION SDN. BHD.

v.

HOTEL CONTINENTAL SDN. BHD.

HIGH COURT MALAYA, PENANG
TUAN VINCENT NG KIM KHOAY J
[CIVIL SUIT NO: 22-97-96]
15 MAY 1996

CIVIL PROCEDURE: *Injunction - Application for - Principles applicable when exercising discretion to grant or refuse - American Cyanamid Co. v. Ethicon Ltd.*

CIVIL PROCEDURE: *Injunction - Serious questions to be tried - Whether necessary to establish prima facie case - Whether necessary to establish probability of success at trial.*

CIVIL PROCEDURE: *Injunction - Interlocutory injunction - Application for - Court's paramount concern - Essential justice of the case - Whether plaintiff's financial means relevant.*

CIVIL PROCEDURE: *Injunction - Balance of convenience - Whether in favour of granting.*

TORT: *Rule in Rylands v. Fletcher - Vibration from piling work - Cause of action - Whether under Rylands v. Fletcher - Or under tort of actionable nuisance.*

EVIDENCE: *Expert evidence - Conflicting testimony - Opinion based on reports of facts and empirical observation - Approach taken by Court.*

TORT: *Nuisance - Vibration from piling work - How to establish liability where nuisance produces material damage.*

TORT: *Nuisance - Vibration from piling work - Whether hammer method of piling is a reasonable use of land.*

TORT: *Nuisance - Vibration from piling work - Whether taking all reasonable care to prevent damage is good defence.*

TORT: *Nuisance - Vibration from piling work - Whether transient nature of nuisance relevant.*

The plaintiff had earlier obtained an *ex parte* injunction restraining the defendant from continuing with construction work on the latter's premises. As *ex parte* injunctions have a life-span of only two weeks, the plaintiff applied for an *inter parte* injunction extending the same. Meanwhile, the defendant filed an application to set aside the *ex parte* injunction. It also resisted the *inter parte* application for the injunction to continue. The parties agreed that both their applications could be heard together.

The plaintiff is the owner of a piece of property on which stands a historical mansion ('the mansion'). The defendant is the owner of an adjacent plot of land ('the project land') on which a hotel stands. The defendant had commenced construction work to extend the back of the hotel which was facing the back of the mansion. Piling work was carried out thereat using the hammer piling system.

The plaintiff claimed that severe cracks had appeared on the walls of the mansion due to excessive vibration from the piling work. It was submitted that unless an alternative piling system was adopted, the safety and structural stability of the mansion would be endangered. The plaintiff further submitted that the mansion, which was built in the 1880's, is a heritage building acknowledged as an architectural masterpiece; and that considerable time, effort, and money had been expended to restore the mansion. The plaintiff also averred that it had approached the defendant requesting it to stop the piling work until a different piling system has been adopted, but to no avail.

The defendant based its application to set aside the *ex parte* injunction on two grounds, ie,: (i) the plaintiff did not disclose the fact that there were existing cracks in the mansion even before the commencement of the piling work; and (ii) the opinion of the plaintiff's own expert did not support the plaintiff's contention that irreparable damage would be caused to the mansion if the piling work continued.

In opposing the *inter parte* application for the injunction to continue, the defendant relied on the following grounds: (i) that the piling work was only temporary; (ii) that it had taken reasonable precautions to minimise the risk of damage to its neighbours; (iii) that construction work is not an unreasonable use of land, and that to restrain the defendant from engaging in acts which it was legitimately entitled to carry out would amount to an abuse of its right to reasonable use; (iv) that its right to reasonable use should not be affected by the delicate nature of the business or trade apparatus carried out or used in the mansion; (v) that in view of s. 54(g) of the Specific Relief Act 1950 the Courts will be reluctant to grant an injunction on the ground of nuisance if it is not reasonably clear that the act complained of is a nuisance; (vi) that the plaintiff's remedy, if any, laid in a claim for damages and not for an injunction; and (vii) that the balance of convenience and justice laid in its favour as the nuisance could be sufficiently compensated by damages.

The defendant also questioned the sufficiency of the plaintiff's undertaking as to damages.

In the course of the instant hearing, it was discovered that the defendant had not only agreed to make good any damage that might result from the piling work, but had also purchased a comprehensive insurance policy to cover any damage to adjacent property. The Court also discovered that no soil examination in respect of the project land was ever made by the defendant's engineer;

that no earthworks plan was submitted by the defendant's engineer to the local authority for approval; and that the local authority had ordered the immediate cessation of the piling work.

Held:

[1] An injunction is a discretionary remedy. The discretion should be exercised according to the principles laid down in *American Cyanamid Co. v. Ethicon Ltd.*, which are: (i) whether the plaintiff has a cause of action wherein there are serious questions to be tried; (ii) whether the plaintiff can be adequately compensated by damages if he is to succeed at the trial; (iii) whether the defendant can be adequately compensated under the plaintiff's undertaking; and (iv) whether the balance of convenience rests in favour of granting or refusing the interlocutory injunction.

[2] In determining whether there are serious issues to be tried, the plaintiff need not establish a *prima facie* case nor the probability of him succeeding at the trial.

[3] In the instant case, the Court was satisfied that the plaintiff had shown a clear nexus between the defendant's piling work and the cracks in the mansion. The cracks on which the plaintiff's application was founded were fresh cracks, and this was implicitly acknowledged by the defendant when it agreed to pay for any damage and when it purchased the insurance policy. Consequently, there was no failure to disclose facts on the part of the plaintiff.

[4] It was clear that the plaintiff's cause of action was not based on the doctrine of *Rylands v. Fletcher*, but on the tort of actionable nuisance arising from the vibration caused by the piling work carried out on the project land.

[5] The defendant had not bothered to conduct a soil investigation before proceeding with the piling work; this ran counter to the provisions of the British Standard Code of Practice for Foundation 1986 (BS 8004). Furthermore, by not submitting an earthworks plan for approval by the local authority, the defendant had breached s. 70A(l) of the Street, Drainage and Building Act 1974. Additionally, by-law 7 of the Penang Island Earthworks By-Laws 1975 requires a developer to submit a method of protective piling, and to take precautions to protect adjoining lands, buildings, roads and other properties. Clearly, the defendant was in breach of this provision as well.

[6] Where the opinion of an expert is based on reports of facts and empirical observation, the Court has to satisfy itself, on a balance of probabilities, that those facts exist and that the inferences drawn therefrom are sound.

Here, the defendant's expert had merely tried to attribute the cause of the cracks to thermal effects and traffic-induced vibration.

[7] Consequently, the Court found that the defendant's expert was neither professional nor objective and, thus, his evidence had to be viewed with caution and circumspection. The professional views of the plaintiff's expert was accepted.

[8] The action taken by the local authority did not restrain the instant Court's unfettered discretion.

[9] Reasonableness of user in nuisance can only be determined having regard to the defendant's conduct, his knowledge of the detriment to his neighbour, the character of the interference, and a consideration of the nature of the plaintiff's interest and a balancing of that interest against that of the defendant.

[10] The type of nuisance alleged by the plaintiff was nuisance that produced material damage or injury rather than personal discomfort; the damage caused by the vibration was of the physical kind. In such cases, liability is established by proving the encroachment or the damage to the property. The situation of the land affected or the character of the building in the neighbourhood need not be considered.

[11] The nuisance that the hammer method of piling caused resulted in material damage or injury to property; thus, it could not constitute a reasonable use of land. Consequently, there were serious questions to be tried.

[12] If nuisance is proved, it is no defence to show that the defendant has taken all reasonable care to prevent it.

[13] The transient nature of the nuisance which causes physical damage is immaterial if the defendant's activities are a potential hazard to his neighbour, and the neighbour has a cause of action on the first occasion of damage.

[14] Damages will not be an adequate remedy in the case of a heritage building on which substantial money has been spent for restoration purposes, especially if the damage will be irreparable.

[15] One of the principles to consider before an injunction is granted is that the Court is not a tribunal for legalising wrongful acts through an award of damages.

[16] The Court's pre-eminent concern when deciding whether to grant an interlocutory injunction is the essential justice of the case rather than the plaintiff's financial means. In any event, in the instant case, the worth of the plaintiff's property is substantial and, thus, the sufficiency of its undertaking should not be questioned.

[17] In the result, the balance of convenience and justice laid in favour of the plaintiff.

[Plaintiff's application allowed until Court is satisfied that a safe piling system is employed. Defendant's application dismissed]

Cases referred to:

Tunas (Pte) Ltd. v. Mayer Investment Pte Ltd. [1989] 2 MLJ 133 ***(cit)***
Castle Fitness Consultancy Pte Ltd. v. Manz [1990] 1 MLJ 141 ***(cit)***
Cooke v. Forbes [1867] LR 5 Eq 166 ***(cit)***
Andreae v. Selfridge and Co. Ltd. [1937] All ER 255 ***(dist)***
Singapore Finance Ltd. v. Lim Kah Ngam (Singapore) Pte Ltd. [1984] 2 MLJ 202 ***(foll)***
Sedleigh Denfield v. O'Callaghan & Ors. [1940] AC 880 ***(cit)***
Rattray v. Daniels [1959] 17 DLR (2nd) 13 ***(dist)***
Eastern and South African Telegraph Co. Ltd. v. Capetown Tramways Companies Ltd. [1902] AC 381 ***(dist)***
American Cyanamid Co. v. Ethicon Ltd. [1975] 1 All ER 504 ***(refd)***
Rylands v. Fletcher [1868] LR 330 ***(dist)***
Koh Seok Choo v. Chiow Moh [1952] MLJ 32 ***(refd)***
Chan Wing & Sons Realty Co. v. The Asia Insurance Co. Ltd. [1962] MLJ 40 ***(refd)***
Hoare & Company v. McAlpine [1923] 1 Ch. 167 ***(foll)***
The Asia Insurance Co. Ltd. v. Chan Wing & Sons Realty Co. Ltd. [1962] MLJ 266 ***(refd)***
Singapore Finance Ltd. v. Lim Kah Ngam (Singapore) Pte. Ltd., and Eugene H.L. Chan Associates (Third Party) [1984] 2 MLJ 202 ***(foll)***
Kennamary v. Thompson [1981] QB 88 ***(refd)***
St. Helens Smelting Co. v. Tipping [1865] 11 HLC 642 ***(refd)***
Halsey v. Esso Petroleum Co. Ltd. [1961] 1 WLR 683 ***(refd)***
Rapier v. London Tramways Company CA [1893] 588 ***(refd)***
Cheng Hang Guan & Ors. v. Perumahan Farlim (Pg) Sdn. Bhd. & Ors. [1988] 3 MLJ 90 ***(foll)***
Allen v. Jambo Holdings Ltd. [1980] 2 All ER 502 ***(refd)***

Legislation referred to:

Penang Island Earthworks By-Laws 1975, by-law 7
Specific Relief Act 1950, s. 54(g)
Street, Drainage and Building Act 1974, s. 70A(1), (4), (10)

Other sources referred to:

British Standard Code of Practice for Foundation 1986 (BS 8004), ss. 7.2.1., 7.2.2., 7.3.1.
Torts, Clerk & Lindsell, 17th Edn., 1995, paras. 18-20
Torts, Commentary and Materials, Morison, Phegan and Sappideen, p. 794n

For the plaintiff - J.A. Yeoh (Daphne Choy with him); M/s. Shearn Delamore & Co. Penang
For the defendant - Ooi Teik Ho; M/s. Ooi, Lee & Co., Penang

JUDGMENT

Vincent Ng Kim Khoay J:

The plaintiff, a private limited company incorporated in Malaysia, are at all material times the registered proprietor and occupier of the property known Holdings Nos. 21 and 22, Town Subdivision 19, North East District, Penang, on which stands the premises commonly known as Cheong Fatt Tze Mansion.

The defendant are the registered proprietors of an adjacent land known as Holding No. 23, Town Subdivision 19, North East District Penang on which the Hotel Continental (the Hotel) is situated. The defendant are currently in the process of building a 20-storey extension to the Hotel on the small portion of their said property at the back of the Hotel (the extension site). This extension site faces the back portion of the Mansion, separated only by an eighteen (18) feet-wide service road. The defendant commenced building works on the extension site on or about 18 March 1996 and had caused piling works to be carried out through the use of the hydraulic piling system. The system employed involves hammering pre-stressed or pre-formed large displacement concrete piles into the ground.

Briefly stated, the plaintiff's case is that they had purchased the Mansion about four years ago at the approximate purchase price of RM2.75 million and they later expended a further sum of about RM3 million for the purposes of restoration works including preserving and conserving the features and fabric, and tapestry of the building to its original state. In their affidavits they had deposed that to restore the mansion as a heritage building, considerable time, effort and expense was expended in engaging expert craftsmen from China to supervise the restoration works which included intricate and delicate porcelain tapestry works. They complain that by virtue of the continuous said piling works, severe cracks have appeared on the walls of the Mansion due directly to the excessive vibrations created by such method of piling employed. And, it is imperative that unless an alternative system of piling works be adopted to avert such vibrations or pressures on the Mansion the very safety and structural stability of the Mansion would be endangered, considering the age and foundation of the building and other features peculiar to buildings of that era. Although the plaintiff have approached the defendant to cease the said piling works pending the adoption of an alternative piling system to avert vibrations and to avoid any damage to the Mansion, the defendant have refused to heed the plaintiff's request.

The plaintiff then filed and obtained an *ex parte* order of injunction from the High Court on 29 March 1996. (See Encl. 5)

Since the *ex parte* injunction order has a life span of only two weeks the plaintiff in their summons-in-chambers dated 5 April 1996 (Encl. 7) applied *inter parte* for *inter alia,* an interlocutory injunction to restrain the defendant

from causing or permitting piling and/or related building works to continue on the defendant's site and/or causing or permitting to continue any vibration or nuisance of a like kind pending the determination of an alternative system of piling. The application is supported by affidavits of Tan Chong Kheng (Encls. 2 and 6), a shareholder and director of the plaintiff company.

Three days latter on 8 April 1996, the defendant filed an application under Encl. 13 to set aside the *ex parte* injunction order dated 29 March 1996, supported by the affidavits of Loh Boon Choon @ Loh Loo Teong (Encl. 12), the managing director of the defendant and Loh Lean Cheng, the superintending engineer of the overall construction of the building extension, (Encl. 11) and the affidavit of Loh Hock Swee, a director of the adjoining Hotel Malaysia (Encl. 14).

Thus, now before me for determination are the two enclosures *viz.* Encls. 7 and 13.

The defendant's application in Encl. 13 for the *ex parte* injunction to be set aside was grounded on:

i) non-disclosure of facts by the plaintiff *viz*. that cracks had existed before the piling operation; and

ii) the plaintiff's affidavit containing their own expert's opinion does not support their contention that irreparable damage would be caused to the Mansion should the piling operation continue. It was also contended that having regard to the *ex parte* nature of such injunction the Court ought to deal with great strictness and severity with the person who apply for *ex parte* injunction. (Cited: (i) *Tunas (Pte) Ltd. v. Mayer Investment Pte Ltd*. [1989] 2 MLJ, 133, and (ii) *Castle Fitness Consultancy Pte Ltd. v. Manz* [1990] 1 MLJ 141 at 144).

The defendant have also resisted this *inter parte* application in Encl. 7 for (in effect) the injunction to continue on the grounds that:

a) The piling works is on a temporary basis;

b) Reasonable precautions have been taken since the piling operation commenced to minimise the risk of damage to their neighbours. (Cited: *Cooke v. Forbes* [1867] LR 5 Eq 166 at 173);

c) Construction work, including piling operation is not *per se* an unreasonable use of land or an actionable nuisance and thus the defendant cannot be held liable on matters which they are legitimately entitled to carry out. (Cited: *Andreae v. Selfridge and Co. Ltd.* [1937] All ER 255; *Singapore Finance Ltd. v. Lim Kah Ngam (Singapore) Pte Ltd*. [1984] 2 MLJ 202 and *Sedleigh Denfield v. O'Callaghan & Ors*. [1940] AC 880). And, to restrain the defendant from engaging

in their present operation world amount to a derogation of the defendant's right to reasonable use of their own land; which – it was further submitted – should be unaffected by the delicate nature e.g. of the business (as in *Rattray v. Daniels* [1959] 17 DLR (2nd) 13 (Extract from Morison, Phegan and Sappideen on *Torts, Commentary and Materials*, p. 794n)) or trade apparatus (as in *Eastern and South African Telegraph Co. Ltd. v. Capetown Tramways Companies Ltd.* [1902] AC 381.) carried out or used in the adjoining land;

(d) In the light of s. 54(g) of Specific Relief Act 1950, the Court would be less ready to grant an injunction on the ground of nuisance to prevent an act of which it is not reasonably clear that it will be a nuisance;

(e) The plaintiff's remedy in such a case if any is only good in a claim for damages and not injunction (*Cooke v. Forbes (supra)* was again cited); and

(f) The balance of convenience and justice lies in favour of the defendant, and the nuisance, if any, could be sufficiently compensated in damages. (Cited: *American Cyanamid Co. v. Ethicon Ltd.* [1975] 1 All ER 504).

Briefly, the plaintiff's application for both an *ex parte* injunction and the *inter parte* injunction, is grounded on their complaint over the various cracks in the Mansion arising from the piling works carried out by the defendant, which had resulted in a real risk of irreparable damage to the safety and integrity of Mansion. It is not disputed that the said Mansion was built in or around 1880's, and that it is a heritage building in the aesthetic or cultural sense and acknowledged as an architectural master-piece with its special tapestry and fabric features.

Both parties had at the outset agreed that both Encls. 7 and 13 could be heard and adjudicated together.

Save the defendant's issue pertaining to the plaintiff's non-disclosure on the obtaining of the *ex parte* injunction, all the other issues submitted by both parties in respect of both the encls. 7 and 13 overlap and may now be considered together.

An injunction is a discretionary remedy, but the discretion should be exercised in accordance with the certain accepted governing principles as laid out in *American Cyanamid Co. v. Ethicon Ltd. (supra)* as follows:

1) whether the plaintiff has a cause of action in which there are serious questions to be tried. Though, in this regard it is not strictly necessary to require the plaintiff to succeed in establishing a *prima facie* case or the probability that he will be successful at the trial of this action;

2) whether if the plaintiff were to succeed at the trial he could be adequately compensated by the award of damages;

3) whether the defendant would be adequately compensated under the plaintiff's undertaking; and

4) whether the balance of convenience lies in favour of granting or refusing the interlocutory injunction.

Before I consider the four (4) above principles I shall first deal with the contention of non-disclosure in obtaining the *ex parte* injunction. After careful reading of the affidavit of Tan Chong Kheng affirmed on 29 March 1996 in support of the *ex parte* injunction (Encl. 2), and the affidavit of Tan Chong Kheng affirmed on 5 April 1996 (Encl. 6) in support of the *inter parte* injunction, the opposing affidavits (Encls. 11, 12 and 14), in the application to set aside, and the affidavit in reply dated 20 April 1996 (Encl. 17), I find that there is no material non-disclosure on the part of the plaintiff when they sought the *ex parte* order; as I am fully satisfied that, even in their initial affidavit and the report of their engineer, the plaintiff had sufficiently shown a clear nexus between the defendant's piling works and the cracks in the Mansion. The relevant cracks upon which the *ex parte* application was made were obviously fresh cracks, serious in nature and bearing no fungus or dirt marks.

In this regard, the defendant had with the aid of several photos sought to show certain other cracks found in the Mansion which were not caused by their piling operations. However, I find, these were not the cracks in respect of which the plaintiff had founded their application for the injunction, but rather old cracks (projected by the defendant for consideration) which appear to be superficial cracks, with dirt marks and traces of fungus, that occur in old buildings. It cannot escape this Court's attention that the defendant's engineer has apparently chosen to ignore the fact that the cracks, referred to and identified by the plaintiff, were indicative of fresh cracks. Indeed, the defendant's engineer had in his reports of 21 March 1996 and 28 March 1996 (Exh. 'LLC 7' of Encl. 11) implicitly acknowledged that the cracks were fresh cracks, when he did not categorically deny, but instead undertook on the defendant's behalf to make good any damage that may result from the piling works, and said that the defendant have bought a comprehensive insurance policy to cover damage to adjacent properties.

Clearly the plaintiff's cause of action is not based on the doctrine of *Rylands v. Fletcher* [1868] LR 330, but on the tort of actionable nuisance arising out of vibrations caused by piling works carried out on the defendant's land, located only 18 feet away from the Mansion. That this is trite law has been firmly established in several local authorities including *Koh Seok Choo v. Chiow Moh* [1952] MLJ 32, *Chan Wing & Sons Realty Co. v. The Asia Insurance Co. Ltd.* [1962] MLJ 40 (which followed *Hoare & Company v. McAlpine* [1923]

1 Ch. 167, 176) and *The Asia Insurance Co. Ltd. v. Chan Wing & Sons Realty Co. Ltd.* [1962] MLJ 266.

In para. 16 of Encl. 11 Loh Lean Cheng (Mr. Loh), the defendant's project engineer supervising the overall construction of the Hotel extension said that the cracks appearing in the Mansion may be due to extraneous factors other than the piling works. Whereas, the plaintiff's consultant engineer of the plaintiff's firm Mr. Yap Ching Chau (Mr. Yap) had categorically stated in para. 2.0 of his report dated 5 April 1996 that "it is obvious that the piling works which commenced on or about 18 March 1996 have resulted in these cracks appearing on parts of the Mansion nearest to the piling site". Mr. Yap also said that there were numerous, severe cracks which were fresh cracks with no fungus growth or stain marks. He further said that such severe cracks could in all probability result in the safety and the integrity of the premises being severely compromised "in the sense that the foundation and the building structure of the Mansion would be weakened and destabilised with the eventual result that it would not only lose its heritage value but may be condemned as unfit for human habitation if the piling works should continue without the requisite safety precautions", and that "the special and tapestry feature once damaged will be difficult to replace".

As there is conflict in expert evidence, the Court's approach in evaluating such conflicting evidence – besides evaluation of credibility – is not only to examine the scientific grounds and basis on which they rely (see case *Singapore Finance Ltd. v. Lim Kah Ngam (Singapore) Pte. Ltd., and Eugene H.L. Chan Associates (Third Party)* [1984] 2 MLJ 202) but also, in my view, if one of the experts is involved in the impugned-works (as here), the Court may examine the manner in which he had implemented the proposed works as an engineer.

It is common ground that the engineer Mr. Loh had made no examination of the soil in the extension site but had rather adopted the soil investigation of the piece of land adjacent to the Hotel.

This Court is unable to accept how Mr. Loh could comment and least of all vouch for the safety of the Mansion when he had not even caused the essential pre-requisite procedure of a soil investigation to be carried out before designing the foundations of a 20-storey structure and before proceeding with the piling works. The consequences of such approach particularly in a highrise project may be disastrous, more so when the proposed 20-storey extension is in the immediate vicinity of the said premises. It is disturbing that the defendant's engineer could borrow the soil investigation report on an adjacent site as the basis of the foundation for the proposed highrise building extension.

From my reading of s. 7.2.1 of the British Standard Code of Practice for Foundation, 1986 (BS 8004), a ground investigation through soil tests of the building site is a *sine qua non* in order to determine the length, spacing and

the size of the piles that may be used. And s. 7.3.1. (of BS 8004) states that an understanding of the ground condition would also determine the types of piles to be used and the effects produced by the applied loads. Further, to be noted is, that this same section enjoins the project engineer to take into consideration the safety and the stability of nearby buildings, while s. 7.2.2 (BS 8004) requires him to carefully appraise nearby structures when he considers the choice of piles to be used. This the engineer had clearly failed to do in the instant case, which may have directly resulted in the cracks complained of.

The importance of the soil investigation report is far too crucial to be ignored particularly when the defendant's engineer has acknowledged that "Penang island is notorious for its land settlement problems as evidenced by the foundation settlement on the infamous Northam Court, which ultimately led to its complete demolition; and the tilting of other multi-storey buildings". It is equally disturbing that the defendant's engineer had not submitted their earthworks plans for the approval of the Majlis Perbandaran Pulau Pinang until 26 April 1996 in the midst of the proceedings herein. It is difficult to justify any exemption for a proposed 20-storey building in a highly built-up area of town, considering that Majlis Perbandaran Pulau Pinang would require earthworks plan including a soil investigation report for any building exceeding five storeys. Even though s. 70A(1) of the Street Drainage and Building Act 1974 enjoins that no person shall commence or carry out or permit to be commenced or carried out any earthworks without having first submitted to the local authority plans and specifications in respect of the earthworks (which, according to s. 70A (10), includes piling works) and obtained the approval of the local authority thereto, yet the defendant had insisted that such earthworks plan is unnecessary. Furthermore, under by-law 7 of the Penang Island Earthworks By-Laws 1975, unless exempted by the Local Government Board Management, a developer (the defendant here) is required to submit *inter alia* not only a method of protective piling but also precautions taken to protect the adjoining lands, buildings, roads and other properties. Thus, it is no surprise then that in the instant case the local authority has exercised their powers under s. 70A(4) to order (*vide* their letters to defendant dated 1 April 1996 and 10 April 1996 (Exhs. TCK 3 and TCK 4 of Encl. 17) the immediate cessation of the defendant's piling works.

There is also *dicta* in *Lim Kah Ngam (supra)* to the effect that where the opinion of an expert is based on reports of facts and empirical observation, the Court has to satisfy itself, on a balance of probability, whether those facts did in truth exist and whether any inference, or inferences drawn from those facts, taken individually and collectively, are sound or not.

It ought to be noted that, rather than commenting on the fresh cracks appearing on the floor, back facade and balcony parapet walls of the premises, which were allegedly caused by the vibrations from the piling works, Mr. Loh (the

defendant's engineer) merely attempted to attribute certain cracks (identified by him) to have been probably caused by thermal effect and traffic-induced vibrations by citing certain case study. Yet, the irony is that the very findings in the case studies cited by Mr. Loh went against his contentions. As para. (iv) of the finding states: "The condition of two buildings studied was judged to be reasonable and such faults as had developed were not thought to be connected with vibration from traffic", and para. (v) states: "The other buildings exhibited significant cracking of both brickwork and plaster finishes and both had substantial settlement problems. In both cases, however, the observed damage could be attributed more plausibly to other site factors than the exposure to traffic vibration."

The defendant's engineer had presumed that "any qualified, experienced professional engineer will know for certain that sand or sandy gravel is not found in the Georgetown area and especially in the first 60 feet from the ground surface". Yet, the very soil investigation in respect of the adjacent site relied upon by the defendant's engineer shows that "the thickness of this layer (of sand immediately underlying the fill layer) varied from 10 feet to 23 feet. The Standard Penetration Test indicated that this layer was "in loose to medium dense stage". The defendant have acknowledged that large displacement piles had been used on the piling operation which they had hitherto completed to the extent of 30%. And their engineer has volunteered the information that large displacement piles as used in the site adjacent to where the Hotel now stands "are not used in sandy areas because such piles cannot penetrate the sand". Hence, it would follow that the large displacement piles, already in place in the defendant's site, had been forcibly driven down through the sandy layer with all resultant vibrations and effects on the Mansion. Consequently, the said mansion could not be immune from the vibrations as its foundation sits on the same sandy layer.

For all the above reasons, I find the professional views of engineer Mr. Yap the more credible of the two experts' evidence and I also accept his professional opinion that the crux of the complaint is not merely a matter of cracks hitherto caused, but more importantly, that the foundation and building structure of the Mansion would be seriously weakened, destabilised and made unfit for human habitation should the piling works continue. On the other hand, after having studied the various affidavits and reports of the engineer Mr. Loh, I find that his opinion in this regard is neither professional nor objective and should be read with caution and circumspection. In this regard, I also note with regret that the plaintiff's suggestion (as reflected by the very wording of the injunction prayed) that an independent engineer be appointed to evaluate the situation, did not find favour with the defendant.

The unfortunate feature that emerged during the course of the hearing is that several affidavits which should more properly be affirmed by the defendant, *viz.* Encl. 25 (the affidavit attacking the worth of the plaintiff's undertaking in

damages) and Encl. 28 (which states that: "the damage that will be done to the defendant will be enormous ...") have been affirmed by the defendant's building project engineer, Mr. Loh; although I am mindful that there is no rule to bar him from so doing. Furthermore, the peculiar tenor and style of expression found in Mr. Loh's affirmation especially para. 18 of Encl. 11 (which volunteered the undertaking: "I further guarantee that the continued piling ... will not cause any irreparable damage to the Mansion ...) is, to me, suggestive of a vein of a deponent who discloses an interest which is more than that of merely a professional engineer on the project.

Surely, after revelation of the above professional inadequacies on the part of the defendant's engineer, and this Court being satisfied that the cracks in the Mansion complained of were fresh cracks caused by the piling, and having also, from the evidence available at this stage of the proceedings, accepted the plaintiff's consultant engineer's report that the building has been put a real probability of severe damage, the said piling works ought not to be allowed to continue in the manner hitherto carried out; a *fortiori,* as precautionary measures purportedly adopted by the defendant to avert the vibrations have apparently failed to avert the cracks caused to the Mansion and also considering that 70% of the piling works remains to be completed. Although the Majlis Perbandaran Pulau Pinang stop-work notice served on the defendant coupled with their complaint that the defendant had not furnished them with the earthworks plan, do not in any manner pose any restraint on this Court's unfettered discretion here, yet the prompt action taken by the said city council only goes to fortify this Court's view that the defendant should not be allowed to continue their piling operations until a safer method could be employed.

The defendant's Counsel had also submitted that the piling works could constitute reasonable user of and, that the resultant vibration ought not to be treated as an ordinary actionable nuisance in order to found an application for an interlocutory injunction. The case of *Andreae v. Selfridge & Co. Ltd.* [1937] All ER 255 was cited in support.

Reasonableness of user in nuisance can only be determined having regard to the defendant's conduct and knowledge of the detriment to his neighbour, the character of the interference and consideration of the nature of the plaintiff's interest and a balancing of that interest against that of the defendant. See Clerk and Lindsell on *Torts,* 17th Edn. [1995] paras. 18-20. See *Kennamary v. Thompson* [1981] QB 88.

The doctrine of reasonable user of land as enunciated in *Andreae (supra)* postulated the right of the owner reasonably and freely to use his property even though grave loss to his neighbour may result. In that case, damages were sought for nuisance for dust and noise (rather than physical damage or injury to property or person) caused by demolition and excavation carried out on the defendant's land.

Here it is important to bear in mind that the specie or genus of nuisance upon which the plaintiff have brought their action, involves physical damage and injury; in other words, nuisance that produces material to property or persons, productive of sensible personal discomfort. See paras. 18-08 of Clerk and Lindsell on *Torts* (17 Edn.). Clearly, in my view, damage to building caused by vibrations is of the physical kind, and the liability for the nuisance caused by such vibrations is established by proving the encroachment or the damage to the property as the case may be. Hence, the situation of the land affected or the character of the building in the neighbourhood is not a matter to be taken into consideration. See *St. Helens Smelting Co. v. Tipping* [1865] 11 HLC 642, per Lord Westbury LC at 650; *Halsey v. Esso Petroleum Co. Ltd.* [1961] 1 WLR 683, 689-692.

If at all we are serious about addressing the concern of landowners over damage to their property as a result of construction works on adjoining lands, could we accept the contention that impact piling could be considered reasonable user of land so as to free the party who causes the damage from any liability, by virtue of the doctrine of reasonable user? The facts in none of the English authorities cited by the defendant's Counsel concern vibrations arising out of construction-piling operations. Even if they do, I am not persuaded to adopt this doctrine as to do so would be disastrous especially to the State of Penang, with its many heritage buildings and its heavy dependence on the tourism trade. Furthermore, the British land conditions are different from Malaysian land conditions, where landslides are common occurrences here. I am however persuaded to adopt the approach taken in *Hoare and Company v. McAlpine* [1922] l Ch. D 167 (an English authority cited by Counsel for the plaintiff, which was followed in *Chan Wing & Sons Realty Co. v. The Asia Insurance Co. Ltd. (supra)*, the facts wherein are not dissimilar to our current case. In that case: in preparing a site for a large building in the heart of the city, the defendant drove a very large number of piles into the soil, thereby setting up such heavy vibrations as to cause serious structural damage to an old house belonging to the plaintiff with the result that a greater part of the building had to be taken down in compliance with a dangerous structure notice. It was therein held that the plaintiff's house though very old was not in such an abnormally unstable condition as to prevent the vibration being treated as an ordinary actionable nuisance. Hence, in my judgment, as the hammer method of piling may cause nuisance that produces material damage or injury to property or persons it cannot in any event constitute reasonable user of land as contended.

My considered opinion is that both the cases, *Rattray (supra)* and *Eastern and South African Telegraph Co. Ltd. (supra)* which concerned delicate nature of the neighbour's business or trade apparatus are inapplicable whereas the decision in *Hoare and Company (supra)* which dealt with the question of an old building is more on point in the present context.

I can see no justification for the Mansion being physically shaken to a premature and untimely end. It is not disputed that the Mansion though somewhat infirm compared to modern buildings, had been built in accordance with principles prevailing at the date of its construction. And neither is it contended nor do I find any evidence proffered by the defendant to show that the building is in an abnormally fragile state or unstable condition, despite of it being built in the 1880's. Thus, the eternal question this Court must pose to itself is: When does an old building lose its ordinary right of protection against destruction or risk being destroyed by the type of operations carried out on the neighbouring land? Surely, the answer to this question would determine forever the character and aesthetic appearance of our towns and cities; in my view that question has been determined in England in *Hoare and Company (supra).* Be it noted that there is no specific legislation for the protection of heritage buildings in our country. The prospect of heritage buildings in Penang and other states in Malaysia – if they are to be permitted to continue their existence in the midst of the onslaught of development – seems to me to be alarming, especially to conservationists, if this Court is to hold that hydraulic hammer piling could, as contended by the defendant, constitute reasonable user of land and thereby absolve the defendant from any liability.

Without doubt one of the unique and tangible assets that has brought about Penang's success in tourism is its heritage buildings, and it is not in the public interest to allow such a building to be exposed to the very real danger complained of just because it is too old to stand the vibration-inducing hammer-piling method, that even until now the defendant had insisted on using and are intent upon continuing. Lest the connotation of the word "development" should eclipse "conservation" in the context of the current case, let us not lose sight of the fact that heritage buildings here are very much a characteristic part and parcel of Penang State's cultural history which has enhanced its tourist appeal, and conservation through restoration of such buildings is not only not inconsistent with development but should indeed be recognised as a form of development; certainly the Cheong Fatt Tze Mansion is eminently one such heritage building.

In the event, I am entirely satisfied not only that there are serious questions to be tried but also that the plaintiff have in fact, made out a *prima facie* case for an actionable nuisance against the defendant. It is trite law that if nuisance is proved it is no defence to say and to prove that the defendant have taken all reasonable care to prevent it. See *Rapier v. London Tramways Company CA* [1893] 588.

Having dealt with the above issues, I shall now turn to the question of balance of convenience.

The defendant's project engineer has in his proposal to reduce piling-induced vibration, suggested a reduction of the hammer-drop from the normal 5 ft. to 6 ft. to one foot. To this the plaintiff's consultant engineer expressed grave doubts "as to whether such reduction in hammer-drop would have the force to drive in the piles." From the way I look at it, perhaps the suggested meagre hammer drop of one foot may turn out to have the net effect not unlike that of an attempt to drive a pole into the ground by knocking it with a coconut. Mr. Loh had also stated (in para. 11 of his affidavit affirmed on 8 April 1996 (Encl. 11)) that a mixed-piling system could not be employed without endangering the building extension. This assertion was made without support of any independent expert opinion or case studies. Even if true, I am of the view that the defendant should be held responsible for the folly of their own misdeeds for having in the first instance commenced piling works without the pre-requisite soil investigation of the extension site, and contrary to the requirements of the said laws and regulations.

In their proposals to save the Mansion, the plaintiff had canvassed various measures including a vibration breaking trench be dug between the sites with sheet piling or timber shuttering of trench wall. To these proposals there was no positive response from the defendant, save to affirm their intention to continue with the piling works (in the teeth of the stop work notices from MPPP) and also to offer, at the 11th hour (in the affidavit of Loh Boon Choon affirmed on 17 April 1996 (Encl. 15)), to extend to the plaintiff a bank guarantee in the sum of RM300,000 against future damage, if any. In this regard, I find the plaintiff's rejection of the said offer not unreasonable or unexpected as they have consistently maintained (and not seriously disputed by the defendant) that: the Mansion is a heritage building, on which they had expended RM3 million on restoration works, which took a period of four (4) years to complete; and that the anticipated damage, if it occurred, would be irreparable.

Also, the temporary nature of such nuisance which caused physical damage is immaterial so long as the defendant's activities have constituted a potential hazard to his neighbour, and the neighbour has a cause of action on the first occasion of damage. See paras. 18-13 of *Clerk and Lindsell (supra).*

It is quite obvious to me from the affidavits that damages world not be an adequate remedy in the case of building pre-eminently and manifestly accepted as a heritage building where a colossal sum of RM3 million had been spent on restoration works including intricate porcelain tapestry works with the help of artisans brought in from China. In this regard it is perhaps appropriate to adopt the *dicta* of Veale J in *Halsey v. Esso Petroleum Co. Ltd.* [1961] 1 WLR 683, which (at p. 703) was expressed thus:

> An injunction is a discretionary remedy, but the discretion should be exercised in accordance with accepted principles. One, but only one, of those principles is that the Court is not a tribunal for legalising wrongful acts by an award of damages.

On the final issue raised by defendant concerning the sufficiency of the plaintiff's undertaking as to damages, the short answer to this is that the essential justice of the case rather than the plaintiff's financial means ought to be the Court's pre-eminent concern when deliberating whether to grant an interlocutory injunction. This position in law has been plainly set out by Edgar Joseph Jr. J (as he then was) in *Cheng Hang Guan & Ors. v. Perumahan Farlim (Pg) Sdn. Bhd. & Ors.* [1988] 3 MLJ 90 which adopted the approach taken by the Court of Appeal in *Allen v. Jambo Holdings Ltd.* [1980] 2 All ER 502.

Edgar Joseph Jr. J had this to say:

> I must next deal with the sufficiency of the plaintiff's undertaking as to damages. It is true that an undertaking by a plaintiff as to damages ought to be given on every interlocutory injunction, though not where the order is in the nature of a final order: *Fenner v. Wilson* [1893] 2 Ch. 656; and except under special circumstances effect ought to be given to it (per James LJ in *Graham v. Campbell* [1878] Ch. D 490. See also note by Jessell MR in *Newcomen v. Coulson* [1878] 7 Ch. D 764).
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> This requirement applies even if the plaintiff has no assets and is legally aided: *Allen v. Jambo Holdings Ltd.* [1980] 2 All ER 502. It is true, that perhaps, in such circumstances the undertaking is an empty shell and should not therefore be demanded since the maxim is that equity does not act in vain. But response to this argument is that such a plaintiff may win damages at the trial and yet may have wrongly obtained an interlocutory injunction as in *Barclays Bank Ltd. v. Rosenberg*, Financial Times, 12 June 1985. In such an eventuality, the damages awarded would constitute assets available to meet the liability on the undertaking.
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> In any event, the Court will not generally deny a plaintiff an interlocutory injunction to which he would otherwise be entitled simply on the ground that his cross-undertaking in damages would be of limited or of no value. So, for example, in *Allen v. Jambo Holdings Ltd. (supra)* the Court of Appeal held, when granting a *Mareva* injunction, that a cross undertaking was acceptable from the plaintiff although he was legally aided. The rationale behind this was that questions of financial ability ought not to affect the position in regard to what is the essential justice of the case.

Considering the substantial worth of the plaintiff's property and the considerable value-added restoration works carried out as aforesaid on the Mansion, I can see no reason to question the sufficiency of the plaintiff's undertaking as to damages. In any event, the essential justice presented by the facts here demands that this final issue be also held in favour of the plaintiff, and I so do.

Consequently, in all the circumstances of the case and after considering the law, I am persuaded to find the balance of convenience and justice in favour of the plaintiff, who are entitled to succeed in both enclosures, with costs.

In the event, I would dismiss with costs the defendant's application in Encl. 13, and also allow prayers (i), (ii) and (iii) of Encl. 7 with costs, save that in order to make manifest that this Court in its deliberation, has also thrown into the scales of justice its recognition that development of land should not unduly be impeded, it is ordered that, as for prayer (i)(a) of Encl. 7 the Order hereby made shall be in terms that this interlocutory injunction be continued until such time that the defendant could satisfy this Court that a safe piling system would be employed (i.e. until further order). And to this end the defendant shall have liberty to apply – considering that the duration of an interlocutory injunction, being an equitable and discretionary relief, could also be expressed to be limited until such time before trial of the action.

Reported by S Puvan